Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020

Submission of the Queensland Council of Unions

July 30, 2020

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[redacted]

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[redacted]

Queensland Council of Unions

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Introduction

The Queensland Council of Unions:

The Queensland Council of Unions (the 'QCU') is the peak union body of unions in Queensland representing the interests of twenty-six affiliated unions and 350,000 Queensland workers. The QCU has previously made submissions to this Committee through the 2018 Inquiry into Wage Theft in Queensland.[1] We welcome this opportunity to respond to the Committee's current Inquiry into the Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020 (Bill) (the 'Wage Theft Bill').

Background:

As has been previously identified, wage theft has and continues to impose significant costs on Queensland workers, their families, businesses, and the economy.[2] In 2018, the Committee identified conservatively, that 437,000 Queensland workers were not receiving their full wages resulting in a five per cent loss in income for these individuals and an annual aggregate loss of $1.22 billion in wages. The annual loss for unpaid superannuation was calculated at around $1.12 billion, amounting to $2.5 billion stripped from the Queensland economy every year. A quick review of recent media would indicate that wage theft continues to be a major problem for Queensland workers.

Within this context, the QCU welcomes the introduction of the Wage Theft Bill. The QCU has undertaken extensive consultation with its affiliate unions in the context of the previous Parliamentary Inquiry, Senate Inquiries, and in relation to the current Bill before this Committee.

The QCU's primary focus has been and continues to be, to prioritise the development of a simple, quick, and low-cost jurisdiction for Queensland workers to apply for and receive recompense for their unpaid or underpaid wages and conditions. We note that this will be achieved through the introduction of a wage recovery mechanism under the *Industrial Relations Act 2016* (Qld) (the '*IR Act*'). The QCU also supports those aspects of the Bill which will criminalise repeated, systemic, and deliberate instances of wage theft.

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[1] Qld Parliament Education, Employment and Small Business Committee, Report No. 9 56th Parliament, *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland* November 2018 (the 'Wage Theft Inquiry Report').
[2] Wage Theft Inquiry Report.

The QCU was consulted by the Office of Industrial Relations during the development of the draft Consultation Bill and has had opportunity to provide its comments to the Government through that process. Our comments to this Committee expand upon those provided during consultation and go principally to the technical and legal aspects of the Bill itself.

We would highlight that the QCU sought specific legal advice about one aspect of the Wage Theft Bill, being whether there is any legal impediment to the removal of compulsory conciliation for wage recovery matters that currently applies through the Magistrates Courts jurisdiction in Queensland, and its replacement with a voluntary 'opt-out' conciliation model as envisaged in the Bill.[3]

While the QCU was able to have discussions with the Office of Industrial Relations on this matter, the QCU believes that the matter has remained unresolved in the drafting processes. We would highlight to the Committee that the legal advice, obtained and settled by Mr Chris Murdoch QC barrister at law, confirms that there is no legal impediment to including compulsory conciliation as part of the wage recovery process and we would strongly submit to the Committee that this is an area that should be amended in the current Bill.

The retention of a compulsory conciliation system is not only good policy but is in the interests of ensuring a wage recovery mechanism for Queensland workers is one which will be 'simple, quick and low-cost' for all parties.

Our submission is divided into two parts: the first addressing the amendments to the *Criminal Code Act 1899* (Qld) (the '*Criminal Code*'), and the second to the wage recovery amendments to the *IR Act*.

The submission includes key recommendations for the Committee's consideration which are highlighted in the table below. The QCU would be pleased to address the Committee regarding these submissions, including expanding upon these recommendations as required.

[3] See Appendix 2.

Recommendations:

Wage Theft Criminalisation:

(1) Amend the offence of stealing to read: 'For stealing ~~that is a failure to pay~~ **that involves the withholding** of an amount payable to an employee, or another person on behalf of the employee, ~~an amount payable to the employee or other person~~ in relation to the performance of work by the employee.[4]

(2) Amend Section 391(2) to include a new sub-section (bb):
For the withholding of an amount payable to an employee, or another person on behalf of the employee, consent by or on behalf of the employee to the withholding is irrelevant, if the withholding reduces the employee entitlement to less than the minimum amount or benefit required under the relevant **Act, industrial instrument or agreement**.[5]

(3) Include a new definition of 'withhold':
Withhold means fail to pay, distribute or attribute or otherwise deprive, whether directly or indirectly, and includes –
(a) fail to pay, distribute or attribute to a third party; and'
(b) make an unlawful deduction or require the payment of an unlawful fee or other charge; and
(c) require the payment of an amount to the employer from the employee's entitlements.

Alternately, a note could be included in the legislation to Section 391(6A) stating:

'A failure to pay an employee includes:
(d) a failure to pay, distribute or attribute or otherwise deprive, whether directly or indirectly to the employee or to a third party;
(e) making an unlawful deduction or requiring the payment of an unlawful fee or other charge; or
(f) requiring the payment of an amount to the employer from the employee's entitlements'.

(4) Amend Clause 3 Section 397(7) to include a definition of 'agreement':
Agreement includes a contract of employment.

(5) Amend the Wage Theft Bill to include a new definition of 'employee' in Section 1 of the Code:

'employee' includes for Part 6 Division 1 Chapter 36:
(a) an employee within its ordinary meaning;
(b) an outworker;
(c) an apprentice;
(d) a trainee;
(e) an employee of a labour hire agency;

[4] Strike through means to delete provisions in the Clause. Bold means to add words to the current Clause.
[5] See *Wage Theft Act 2020* (Vic) s 6(2).

(f) a person declared as an employee by an employment tribunal; and
(g) a person who performs work under a contract that is wholly or principally for the purposes of labour;
(h) a former employee.

(6) The Qld Police Service develops in consultation with industrial parties and stakeholders detailed guidelines for the investigation and prosecution of stealing and fraud offences.

(7) The Bill is amended to include a public accountability mechanism for wage theft offences similar to Section 231 of the *WHS Act*.

(8) The Bill is amended to abrogate the common law privilege of self-incrimination for stealing offences from an employee.

(9) The Bill should include a statutory presumption about the production of records and pay slips for state employee wage recovery claims similar to Section 557C of the *FW Act*.

Wage Recovery Matters:

(10) Amend Section 507C(2) Conciliation of the Bill to state:
'The registrar ~~may~~ **must** refer the fair work claim to conciliation'.

(11) Delete Sections 507C(4) and 507C(5):
~~(4) 'If the registrar refers the fair work claim to conciliation and a party does not wish to participate in conciliation, the party must notify the registrar of the fact –~~
~~(a) as soon as practicable; and~~
~~(b) before a conciliation conference begins'.~~
~~(5) If the registrar is notifed under subsection (4) –~~
~~(a) the conciliation must not proceed; and~~
~~(b) the registrar must –~~
~~(i) notify the Industrial Magistrates Court that the conciliation is not proceeding and the reason it is not proceeding; and~~
~~(ii) refer the matter for hearing by the Industrial Magistrates Court'.~~

(12) Amend Section 547C Conciliation sub-section (2):
'The registrar **must** ~~may~~ refer the unpaid amount claim to conciliation'.

(13) Delete Section 547C Conciliation sub-sections (4) and (5):
~~(4) If the registrar refers the unpaid amount claim to conciliation and a party does not wish to participate in conciliation, the party must notify the registrar of that fact –~~
~~(a) As soon as practicable; and~~
~~(b) Before a conciliation conference starts.~~
~~(5) If the registrar is notified under subsection (4)~~
~~(a) the conciliation must not proceed; and~~
~~(b) the registrar must –~~
~~(i) notify the industrial tribunal for the unpaid amount claim that the conciliation is not proceeding and the reason it is not proceeding; and~~
~~(ii) refer the matter for hearing by the industrial tribunal.~~

(14) Adopt simplified rules similar to rules 78 and 79 of the *UCPR* (Qld) to ensure that an application can be made to the Registrar to hear multiple claims relating to the same or substantial matter together, or to issue an order to join those matters.

(15) Any amendment to the civil rules and procedures as is currently applied by the *UCPR* must take account of consequential amendments to the *CP Act* to ensure the conciliation and not ADR processes apply for the conciliation and determination of wage recovery matters under the Bill.

Part 1 - Criminal Code Amendments

Background:

In early 2020, the QCU was consulted over an appropriate model to make wage theft an offence. The Government's preferred model was to make stealing a criminal offence in the same manner that there is an existing offence relating to an employee stealing from their employer under the *Criminal Code*.[6]

Relevantly, in February 2020 the Victorian Government also released a Consultation Paper on a proposed Wage Theft Bill for introduction to the Victorian Parliament.[7] The Paper proposed stand-alone legislation making wage theft a criminal offence, supported by an enforcement model to provide for the investigation of alleged offences by the Wage Inspectorate Victoria with a capacity to refer a matter for prosecution to the Director of Public Prosecutions.

The Victorian Parliament has now passed the Wage Theft Bill, assented to on 23 June 2020 – the *Wage Theft Act No 21 of 2020* (the '*Wage Theft Act* (Vic)').

In June 2020, the Queensland Office of Industrial Relations commenced formal consultations with stakeholders, including the QCU, over a draft Consultation Bill – the Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020.

The Minister for Education and Industrial Relations subsequently introduced the Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020 (the 'Wage Theft Bill') to the Parliament on 15 July 2020.

The Wage Theft Bill is a result of the Qld Parliament's Education, Employment and Small Business Committee's Wage Theft Inquiry Report in 2018.[8] A key recommendation of this report was for the Qld Government to legislate to make wage theft a criminal offence:

Recommendation 15

The committee recommends the Queensland Government legislate to make wage theft a criminal offence, where the conduct is proven to be deliberate or reckless.

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[6] *Criminal Code Act 1899* (Qld) s 391 (the '*Criminal Code*').
[7] Victorian Government 'Consultation Paper Wage Theft Bill 2020, February 2020 <https://www.spaal.com.au/wp-content/uploads/2020/02/Final-Wage-Theft-Consultation-Paper.pdf>.
[8] n 1.

The Queensland Government should consider the variety of models and approaches for criminalising wage theft that were presented to the inquiry and consult further with stakeholders in regard to a preferred model.

The QCU has reviewed the Wage Theft Bill and provides commentary to this Committee in respect to the following areas:

1. Definition and scope of the stealing offence
2. Definition of agreement
3. Who is an employee?
4. Who may be prosecuted?
5. Enforcement, resourcing, and accountability
6. Self-incrimination

Definition and Scope of a Stealing Offence:

The Wage Theft Bill amends the Criminal Code to insert a new offence of stealing, being where an employer:

> '…fails to pay an employee, or another person on behalf of the employee, an amount payable to the employee or other person, in relation to the performance of work by the employer'.[9]

This is a similar offence to the existing criminal offence where an employee (a servant or a clerk) steals from their employer.[10] The Explanatory Notes to the Wage Theft Bill indicate that the stealing offence is intended to capture a broad range of payments and entitlements, including:

- unpaid hours and underpayment of hours
- unpaid penalty rates
- unreasonable deductions
- unpaid superannuation
- withholding entitlements
- underpayment through intentionally misclassifying a worker including wrong award, wrong classification or by 'sham contracting' and the misuse of Australian Business Numbers, and

[9] Clause 4 inserting Section 391(6A).
[10] *Criminal Code* s 398 [Punishment in Special Cases (6) Stealing by clerks and servants].

- authorised deductions that have not been applied as agreed.

These matters also reflect the Inquiry Recommendations from 2018.[11]

However, while the Explanatory Notes address the scope of the Inquiry recommendations, the QCU is concerned that the drafting of the proposed definition of stealing under Clause 4(2) of the Bill is too narrow to cover the field of the types of wage theft complaints that proliferate within industry and particular sectors.

While the QCU notes that the introductory speech of the Minister demonstrates an intention that the definition of a stealing offence in the Wage Theft Bill is to cover a wide range of instances of wage theft, this is not necessarily what a court may decide. We note that in determining the proper interpretation of a statute, a court must first consider the words of the provision itself.[12] It is only after this has occurred, that a court should then give consideration to the context and purpose of the statute. Reading in words should not be done to fill gaps in legislation or make an insertion which is 'too big, or too much at variance with the language in fact used by the legislature.'[13]

In this context, the QCU's concerns are that the definition of stealing in the Bill does not cover:

- unauthorised deductions **after** the payment of wages has occurred,
- pay back arrangements for workers to 'replace' stock damages or unpaid client bills **not** related to amounts payable for the performance of work,
- over-inflated and unreasonable deductions from wages – for example, employment bonds or overcharging for the use of employer accommodation, and
- classifying employees as independent contractors

In this context, the QCU notes the wage theft offence adopted in the *Wage Theft Act* (Vic) has a wider definition:

6 Dishonest withholding of employee entitlements

(1) An employer must not dishonestly –

(a) withhold the whole or part of an employee entitlement owed by the employer to an employee; or

[11] n 1 Section 5.2.4, 55.
[12] *R v A2* [2019] HCA 35 [32], [124], [163].
[13] *Taylor v The Owners – Strata Plan No 11564* 253 CLR 531, 548.

(b) authorise or permit, expressly or impliedly, another person to withhold the whole or part of an employee entitlement owed by the employer to an employee and that other person does so.

…

3 Definitions

Withhold means fail to pay, distribute or attribute or otherwise deprive, whether directly or indirectly, and includes –

(a) fail to pay, distribute or attribute to a third party; and
(b) make an unlawful deduction or require the payment of an unlawful fee or other charge; and
(c) require the payment of an amount to the employer from the employee entitlements.

The following two case studies demonstrate the difference between the application of the stealing offence under Clause 4 of the Wage Theft Bill and the application of the definition of 'withhold' for the purposes of a wage theft offence under the *Wage Theft Act* (Vic).

Case Study 1 – Unlawful Deductions

Declan worked for the Pig'N'Whistle in Brisbane in 2019. Declan's employment contract included a standard condition that he agreed for his wages to be docked for till imbalances.

Deductions were not recorded on pay slips.

At times, Declan was required to hand over this debit card to pay for deductions. Prior to his dismissal, Declan refused to pay for a table of customers that had not paid their bill.

Note: a full extract of this case study is included in Appendix 1 Case Studies to this submission.

In Declan's case, as he was required to hand over his debit card to pay for till imbalances or for where customers had not paid their bills, the wage theft offence as currently drafted would not apply. However, it would apply under the Victorian definition (s 3(b) 'requiring the payment of a charge').

Case Study 2 – Unreasonable deductions

In 2018, more than 50 visa workers supplied by Goyx Labour Hire to Greenmountain meatworks in Coominya, were forced into renting local accommodation at over-inflated prices, not paid superannuation or overtime, failed to have income tax withheld, and were required to pay a bond of up to $600 before starting work.

A former worker Joanne Szu-Jui confirmed that she was forced to rent in a particular house with other workers sharing bedrooms and even sleeping in the lounge room – there were 12 people in the one house.

Note: a full extract of this case study is included in Appendix 1 Case Studies to this submission.

In the Greenmountain case, the requirement to pay an initial employment bond and unreasonable rent would not be covered under the proposed definition of a stealing offence as it does not relate to an amount payable in relation to the performance of work. However, it would be covered under the Victorian definition (definition of 'withhold' (c) – require the payment of an amount to the employer from the employee's entitlements).

Taking into account these case studies, the QCU's position is that the stealing offence as currently drafted: 'a failure to pay an employee… an amount payable **(under an Act, industrial instrument or agreement)**…in relation to the performance of work..,' does not take into account an unreasonable deduction, an unauthorised deduction, or a pay-back arrangement.

The QCU submits that the wage theft offence under the Victorian legislation,[14] is better drafted to clarify that an unlawful deduction, payment of an unlawful fee or charge, or a pay-back arrangement such as outlined above, will constitute a wage theft offence.

On that basis, the QCU makes the following recommendations for amendments to the Wage Theft Bill:

Recommendations:

(1) Amend the offence of stealing to read: 'For stealing ~~that is a failure to pay~~ **that involves the withholding** of an amount payable to an employee, or another person on behalf of the employee, ~~an amount payable to the employee or other person~~ in relation to the performance of work by the employee.[15]

(2) Amend Section 391(2) to include a new sub-section (bb):

For the withholding of an amount payable to an employee, or another person on behalf of the employee, consent by or on behalf of the employee to the withholding is

[14] *Wage Theft Act 2020* (Vic) s 3 (definition of 'withhold').
[15] Strike through means to delete provisions in the Clause. Bold means to add words to the current Clause.

irrelevant, if the withholding reduces the employee entitlement to less than the minimum amount or benefit required under the relevant **Act, industrial instrument or agreement**.[16]

(3) Include a new definition of 'withhold':

Withhold means fail to pay, distribute or attribute or otherwise deprive, whether directly or indirectly, and includes –

(a) fail to pay, distribute or attribute to a third party; and'

(b) make an unlawful deduction or require the payment of an unlawful fee or other charge; and

(c) require the payment of an amount to the employer from the employee's entitlements.

Alternately, a note could be included in the legislation to Section 391(6A) stating:

'A failure to pay an employee includes:

(g) a failure to pay, distribute or attribute or otherwise deprive, whether directly or indirectly to the employee or to a third party;

(h) making an unlawful deduction or requiring the payment of an unlawful fee or other charge; or

(i) requiring the payment of an amount to the employer from the employee's entitlements'.

Definition of agreement:

Clause 4(2) of the Wage Theft Bill states that an amount payable to an employee for the purposes of an offence is converted to a person's own use when it becomes payable under 'an Act, industrial instrument or agreement'. An industrial instrument is defined in Clause 4(3) to mean an industrial instrument under the *IR Act* or the *Fair Work Act 2009* (Cth) (the '*FW Act*'). However, no definition is provided for what is an 'agreement'.

We note that Section 3 of the *Wage Theft Act* (Vic) defines an employee entitlement as an entitlement arising under a relevant law, contract, or agreement.

To avoid litigation on what would constitute the meaning of an 'agreement' through the courts, we would suggest an amendment is made to the Bill to clarify that an agreement includes a contract of employment.

[16] See *Wage Theft Act 2020* (Vic) s 6(2).

Recommendation:

(4) Amend Clause 3 Section 397(7) to include a definition of 'agreement':

Agreement includes a contract of employment.

Who is an employee?

The amendments to the *Criminal Code* to insert a new stealing offence relate to the failure to pay 'an employee'. The Bill does not contain a definition of 'employee' for the purposes of this offence. A court will therefore interpret the meaning according to the ordinary meaning.

Determining the meaning of 'employee' has been a longstanding issue of disputation under various employment related statutes. Invariably, it has been interpreted to mean a person employed pursuant to a contract of services. Where the legislature has intended that this not be so, it has explicitly expanded the definition to include other persons. For instance, the meaning of employee has been expanded in superannuation, workers' compensation, work health and safety, and industrial laws:

Legislation	Section	Meaning of employee
Superannuation Guarantee (Administration) Act 1992 (Cth)	S 12(1), (3)	Ordinary meaning of employee A person who works under a contract that is wholly or principally for the performance of labour.
Workers' Compensation & Rehabilitation Act 2003 (Qld)	S 11, Schedule 2	An employee for the purpose of PAYG. Includes a contractor who is an individual worker who makes a contract with someone else for the performance of work, not incidental to a trade or business regularly carried on by the contractor.
Industrial Relations Act 2016 (Qld)	S 8	An individual who is employed, or usually employed, by an employer. Also includes, among others, a person who is a member of a class of persons declared to be employees under s 465, an outworker, apprentice, or trainee. Specifically includes a definition to include a former employee for a proceeding for an offence or for payment or recovery of amounts (s 8(2)(d)).
Work Health and Safety Act Qld (2011)	S 7	Includes an employee, a contractor, an employee of a labour hire company, an outworker etc.

Table 1: Definition of Employee under Employment Statutes that apply to Queensland workers

The examples of the definition of an 'employee' as outlined in Table 1 above show that the legislature has generally expanded the ordinary meaning of an employee to capture the types of employees to whom the legislature intends to be covered by the statute, rather than leaving the matter for a court to decide.

On this note, the 2018 Wage Theft Inquiry Report recommended that sham contracting arrangements were covered for wage theft offences.

Case Study 3 – Sham Contracting

Samuel was a qualified boilermaker who worked for JBM Trailers and Fabrications at Deception Bay making horse floats.

Initially, Sam was told he was required to provide an ABN number for payment. Sam was also told he would be paid $25 per hour based on an eleven hour day with a half hour meal break.

Within 2 weeks of commencing work, he was then told he would be paid on a piecework basis (per float). Sam ended up being paid $10.90 per hour.

When Sam gave notice, he was owed payment for three invoices, plus underpayments. No timesheets or pay slips were ever provided.

Sam eventually received an order from the Federal Circuit Court via a small claims application for the payment of $8,305.00 from JBM. However, JBM did not pay and Sam was forced to take action to seek an enforcement action in the Court.

The matter was subsequently adjourned as JBM went into receivership.

After three years, Sam has yet to recover any monies owing to him.

Note: a full extract of this case study is included in Appendix 1 Case Studies to this submission.

In Sam's case, it may have been appropriate for the owner of JBM to be charged with a wage theft offence, as they subsequently started a further business interstate while avoiding their obligations to pay outstanding monies.

However, in determining whether a charge could be laid in a similar case under the Wage Theft Bill, the police would first have to decide whether Sam was an employee within the ordinary meaning of the word, and then if they did choose to prosecute over the matter, a court would also need to make an initial decision as to whether Sam was an employee.

Therefore, to clarify the application of the offence to a situation such as Sam, the QCU recommends that a definition of employee is included in the *Criminal Code*. The QCU's preference is for the *Criminal Code* to define who is an employee based upon the definition in the *IR Act* to apply to outworkers, apprentices, trainees, labour hire employees, persons declared as employees by an employment tribunal, and persons who work wholly or principally under a contract for the performance of labour. The definition should also specifically apply to a former employee for an offence under the *Criminal Code*.

Recommendation:

(5) Amend the Wage Theft Bill to include a new definition of 'employee' in Section 1 of the Code:

'employee' includes for Part 6 Division 1 Chapter 36:

(i) an employee within its ordinary meaning;

(j) an outworker;

(k) an apprentice;

(l) a trainee;

(m) an employee of a labour hire agency;

(n) a person declared as an employee by an employment tribunal; and

(o) a person who performs work under a contract that is wholly or principally for the purposes of labour;

(p) a former employee.

Who may be prosecuted?

A further area of concern is in relation to the clarity in the drafting about who may be prosecuted for a stealing offence under the *Criminal Code*. In this context, it is useful to compare provisions in the *Wage Theft Act* (Vic), the *FW Act*, and other employment statutes relating to criminal and civil proceedings, with the proposed stealing offence in the *Criminal Code.*

The *Wage Theft Act* (Vic) is very clear in respect to who may be prosecuted and who is responsible for a wage theft offence. For instance, this includes:

> For body corporates, the employer is taken to be each officer of the body corporate.[17] An officer is defined in accordance with the Corporations Act.[18]

[17] Clause 13.
[18] *Corporations Act 2001* (Cth) s 9 (definition of 'officer').

For partnerships, the employer is taken to be each partner in the partnership.[19]

For unincorporated associations, the employer is taken to be each member of the committee of management of the association.[20]

For the Crown, a proceeding may be brought against the responsible government agency.[21]

For franchisors, the Act clarifies that a person who assists, encourages or directs the commission of an offence is taken to have committed the offence – this could be a franchisor that assists, encourages or directs franchisees to dishonestly withhold employee entitlements.[22]

The *Wage Theft Act* (Vic) also specifies how the conduct and state of mind of officers and a board of directors is to be attributed to a body corporate for the purposes of an employee entitlement offence.[23] Collectively, these provisions make it clear to any party who may be prosecuted and held accountable for a wage theft offence.

Similar provisions also exist in the *FW Act* for civil remedies against an employer with respect to breaches of the Act or an award or agreement. For instance, Section 550 outlines accessorial liability provisions for a person who is found to have been knowingly involved in a contravention of a civil remedy contravention where the person:

(a) has aided, abetted, counselled or procured the contravention; or
(b) has induced the contravention, whether by threats or promises or otherwise; or
(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
(d) has conspired with others to effect the contravention.[24]

Section 557B also provides that a body corporate is liable for a serious contravention where it knowingly contravenes a civil remedy provision, either expressly, tacitly or impliedly authorised the contravention. Sections 558A-558C assign responsibility of franchisor entities and holding companies for particular contraventions.

[19] Wage Theft Bill Clause 14.
[20] Ibid Clause 15(1).
[21] Ibid Clause 16.
[22] Ibid Clause 9.
[23] Ibid Clause 11.
[24] *FW Act* s 550(2)(a)-(d).

These provisions were enacted to capture emergent business models of wage theft – for example franchisor wage theft such as in the example of 7-11 – and reflecting a modern regulatory approach for civil remedies to address systemic wage theft by employers.

In contrast, the Wage Theft Bill relies upon the complicity provisions within the Criminal Code. Therefore, presumably the definition of an employer will have its ordinary meaning and it will remain for a court to decide how the provisions of Sections 7 and 8 of the Criminal Code will apply.

> Section 7 of the Code outlines that an offender includes:
>
> - a person who does or omits to do an act for the purpose of enabling or aiding another person to commit an offence (**an enabler or aider**)
> - every person who aids another person in committing the offence (**an aider**)
> - any person who counsels or procures another person to commit the offence (**a counsellor or procurer**)[25]
>
> In addition, two or more parties may also be deemed to have committed an offence where it is proven they formed a common intention to prosecute an unlawful purpose in conjunction with each other, and it was a probable consequence that an offence would be committed.[26]

In this context, the use of the *Criminal Code* as the vehicle to introduce the wage theft offence of stealing may not provide the clarity required by external parties and stakeholders about who may, or may not be, prosecuted for a wage theft offence.

The QCU has indicated its strong preference during consultations with the Government that this will necessitate the development of detailed public guidelines outlining criterion for the police to initiate an investigation into a wage theft offence, and for a gateway or public interest test for the prosecution of an alleged offence of stealing. The development of these guidelines should accompany clear processes by which a party can make a complaint relating to a stealing or fraud offence to the Qld Police Service, as well as to who may be prosecuted for an offence taking into consideration the application of Sections 7 and 8 of the *Criminal Code.*

[25] Criminal Code s 7(1)(b)-(d).
[26] Ibid s 8.

Given the breadth of wage theft that continues to proliferate in the community and lack of action taken by existing regulators to effectively deal with the issue, the QCU submits that a regulatory accountability mechanism such as exists in Section 231 of the *Work Health and Safety Act 2011* (Qld) (the '*WHS Act*') should be included in the Wage Theft Bill. This provision allows a complainant to write to the relevant Public Prosecutor to request that a prosecution is brought if they reasonably believe an act or omission is a serious offence, and the prosecutor has not commenced a prosecution on the matter after 6 months, but not later than 12 months after the act or omission happens.

Recommendations:

(6) The Qld Police Service develops in consultation with industrial parties and stakeholders detailed guidelines for the investigation and prosecution of stealing and fraud offences.

(7) The Bill is amended to include a public accountability mechanism for wage theft offences similar to Section 231 of the *WHS Act.*

Enforcement, Resourcing and Accountability:

The Qld Wage Theft Bill makes wage theft from an employee a criminal offence under the *Criminal Code*. Investigation and prosecution of an offence will lie with the police. In contrast, while the *Wage Theft Act* (Vic) makes wage theft a criminal offence, that Act has conferred powers and functions on a Victorian Wage Inspectorate to investigate wage theft offences, including providing inspectors with the power to enter premises, conduct searches and seizures, and use search warrants as required. The Wage Inspectorate may also refer a matter to the Office of Public Prosecutions to recommend prosecution.[27]

A clear difference with the proposed system in Queensland is that the Wage Theft Bill does not envisage an investigation function through an appropriately resourced industrial inspectorate. Instead, it relies upon the police for investigation and prosecution purposes.

It has been noted by several of our affiliates that this will act as a disincentive for individuals to come forward with allegations of wage theft. For example, many young people and migrant visa workers who are perhaps among the most vulnerable and exploited when it comes to systemic wage theft, are unlikely to come forward to make a complaint to police to have a matter investigated.

[27] *Wage Theft Act 2020* (Vic) s 71.

It is also unclear what processes will exist for the investigation of a complaint; the criterion for the prosecution of a wage theft offence; or what resources such as specialist support staff and/or training that will be provided to police for wage theft matters. For example:

- will individuals or organisations be able to make complaints e.g. unions, law firms, community organisations etc who may have details of a systemic and repeated wage theft?
- will the matters be dealt with by a special unit with initial access via an online web portal e.g. similar to the Fraud or Financial and Cyber Crime Groups?
- will an investigation be initiated as a result of a Court decision?
- how will the QPS respond and prioritise complaints for wage theft offences?

Recommendation:

(8) The Government commit to developing detailed public guidelines for the investigation and prosecution of wage theft offences, including addressing the above points. **See previous recommendation 6.**

Self-Incrimination:

The common law privilege against self-incrimination for criminal offences prevents a person being compelled to provide documents or answer questions if the documents or answers may tend, either directly or indirectly, to incriminate the person.[28] The privilege does not extend to a corporation, nor to a person providing a document or answering a request that would tend to incriminate another person.[29] It also does not extend to evidence obtained from third parties or documents seized under warrant.[30]

In the case of criminalising wage theft under the Wage Theft Bill, it is noted the privilege will not prevent police from obtaining a warrant to access relevant documentation. However, an unintended consequence may be that an individual employer refuses to comply with existing laws, federal and state, in terms of requested access to and production of time and wages records and related documents, on the basis that an individual may be prosecuted for a wage offence. This could also apply where a worker is seeking to make an application for wage

[28] Office of the Queensland Parliamentary Counsel 'Principles of good legislation: OQPC guide to FLPs' Self-incrimination Version 1 – 19 June 2013.
[29] Ibid 5-6.
[30] Ibid 6.

recovery if a respondent is of the view that a secondary prosecution of a criminal offence may arise resulting from the recovery application.

It is clear that other legislatures have contemplated this issue. Looking at the comparative jurisdictions, Section 49 of the *Wage Theft Act* (Vic) states that a person is not excused from producing documents on the ground the production of the document may incriminate the person. An inspector may also warn a person that a refusal or failure to answer questions without reasonable excuse is an offence.[31]

The *FW Act* also seeks to address the issue of a failure to provide documents or pay slips by including a presumption that an employer must disprove an allegation that they failed to make available records or pay slips relating to the contravention in a civil proceeding, if such an allegation is made.[32] It is noted that this presumption will apply to a wage recovery proceeding under the Wage Theft Bill for a fair work claim. However, it will not apply to a state employee claim.

It should also be noted that the Queensland Parliament has abrogated the common law privilege in other employment related laws. For example, Section 172 of the *WHS Act* provides that a person is not excused from answering a question or providing information or a document, on the grounds it may incriminate or expose them to a penalty.[33]

In summary, while the QCU is mindful that the common law privilege against self-incrimination applies to all criminal offences under the *Criminal Code*, and that this applies generally because of the nature of the penalties attached to a criminal offence versus a civil remedy, we would urge the Committee to give due consideration to balance this against the rights of employees to pursue a wage recovery before an eligible court. These rights should not be jeopardised by an individual person seeking to claim privilege because of a potential charge of a stealing offence.

We also note that the criminalisation of stealing from an employee is a different situation from where an employee steals from an employer under the Criminal Code, where unlike an employee, the employer has full access to all of the information to assist with the police investigation and prosecution.

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[31] *Wage Theft Act* (Vic) s 48.
[32] *FW Act* s 557C.
[33] This is also a provision of the national model Work Health and Safety laws which apply across the majority of states and territories.

On that basis, the QCU submits that the Wage Theft Bill should be amended to include some form of abrogation of the common law privilege, and a statutory presumption about the production of records and pay slips for all Queensland workers.

Recommendation:

(9) The Bill is amended to abrogate the common law privilege of self-incrimination for stealing offences from an employee.

(10) The Bill should include a statutory presumption about the production of records and pay slips for state employee wage recovery claims similar to Section 557C of the *FW Act* for all wage recovery matters.

Part 2 - Industrial Relations Act Amendments

Background:

Recommendation 8 of the Wage Theft Inquiry Report was for the Queensland Government to establish a simple, quick, and low-cost wage recovery process for Queensland workers.

Recommendation 8

The committee recommends the Queensland Government review and take actions available to it, to ensure that wage recovery processes for Queensland workers are simple, quick and low-cost.

This should include further investigation of the following options:

a) establishing a dedicated industrial division within the Queensland Magistrates Court, in line with the example in Victoria
b) investigating the inclusion of the Queensland Industrial Relations Commission or Industrial Court as an eligible state court under the Fair Work Act 2009 (Cth)
c) reviewing relevant forms and processes to ensure the legal process is simple and user friendly for workers and their representatives
d) waiving or reducing current court filing fees for wage theft matters

In regard to Recommendation 8(a), the position of the QCU and its affiliates has been consistent with the Parliamentary Inquiry's recommendation to establish an Industrial Division of the Qld Magistrate's Court, with some streamlining including a case management system to ensure there are sufficient Magistrates with an industrial background and/or training to deal with claims in a timely manner.

In regard to Recommendation 8(b), the QCU is unsure as to whether the Queensland Government has approached the Commonwealth Government with a view to amending the *FW Act* to make the Queensland Industrial Relations Commission or the Queensland Industrial Court an eligible court under Section 12 of the Act. This would have enabled a party to make an application to the QIRC or the Court for a fair work proceeding without the substantive changes envisaged in the Wage Recovery Bill before the Committee.

Notwithstanding, the QCU welcomes a number of amendments to the wage recovery jurisdiction under the *IR Act*, including:

- continuation of the use of conciliation by the Queensland Industrial Relations Commission,

- the ability of an industrial organisation (a union) to appear in matters without leave of a conciliator or the Court,
- restrictions on legal representation for a conciliation matter or small claim proceeding, and
- the commitment to the Government to:
    - develop a detailed benchbook to assist Magistrates and parties in progressing wage recovery matters,
    - introduce a case management system for industrial matters within the Magistrates Court, and
    - develop simplified forms and reduced costs for claims.

These provisions include those as recommended in Recommendations 8(c) and (d).

However, there are a number of matters the QCU would like to comment upon and highlight with respect to the wage recovery mechanism as proposed in the Wage Theft Bill. This includes the removal of the current mandatory conciliation provisions, and matters relating to civil procedure and rules that may impact upon the efficacy of the proposed wage recovery jurisdiction.

Removal of Mandatory Conciliation:

The current system for wage recovery in Queensland provides two options for a person covered by the *FW Act* to pursue a claim for the underpayment of wages or conditions – to make an application to either the Federal Circuit Court or to an eligible state or territory court.[34]

In Queensland, an eligible court includes the Magistrates Court or the District Court of Queensland,[35] with the Magistrates Court the most likely jurisdiction for the majority of wage recovery matters, hearing claims of up to $150,000.

As was previously submitted to the Parliamentary Inquiry into Wage Theft by the QCU and other parties, there have been difficulties with using the Federal Circuit Court jurisdiction which is often a complex, lengthy, and technical process heard by Magistrates often without industrial experience or background. As a result, a number of Queensland unions have therefore looked to use the existing Queensland Magistrates Court jurisdiction.[36] Their

[34] *FW Act* ss 539, 541, 542.
[35] Ibid s 12 (definition of 'eligible court').
[36] *Magistrates Courts Act 1921* (Qld) Part 5A (the '*MC Act*').

experiences have indicated that while the jurisdiction is workable and generally more user friendly, there is still a lack of Magistrates with an industrial background or experience, and it has also been generally under-resourced for wage recovery matters.

However, unions have reported that one of the main benefits of using the jurisdiction is that unlike the Federal Circuit Court, the jurisdiction provides a compulsory conciliation system for all employment claims before the Queensland Industrial Relations Commission.[37]

This is the key concern for the QCU and unions, being the removal of the compulsory conciliation mechanism currently available under the *MC Act*, and its replacement with a voluntary 'opt-out' conciliation model under the Wage Theft Bill.

The advice provided to unions during consultations with the Office of Industrial Relations was that this change was required for Constitutional or other legal reasons. However, the QCU subsequently sought and obtained its own legal advice as previously outlined. This advice is very clear that there is no legal impediment (Constitutional or otherwise) against retaining the existing compulsory conciliation system for fair work claims. **A copy of this advice is attached for the benefit of the Committee in Appendix 2 to this submission.**

Our submissions therefore provide comments on this matter taking into account the legal framework for the recovery of wages jurisdiction under the *FW Act*, the existing wage recovery jurisdiction under the *MC Act* in Qld, and comparing these with the proposed jurisdiction in the Wage Theft Bill.

Wage Recovery Processes under the Fair Work Act:

Currently, in any state or territory in Australia, a plaintiff/applicant may take a fair work claim under the *FW Act* to an eligible court which includes the Federal Circuit Court, or a District or Magistrates Court. This includes an application for a civil penalty for a breach of the *FW Act*, award or agreement.

Under the *FW Act*, it is the right of a plaintiff/applicant to choose or elect to have their claim heard as a small claims proceeding,[38] which is currently limited to a maximum amount of $20,000.[39] This means a Magistrate hearing the matter is not bound by the rules of evidence or formal Court procedures and can hear the matter informally without regard to legal forms and technicalities.

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[37] *Magistrates Courts Act 1921* (Qld) s 42F (the '*MC Act'*).
[38] *FW Act* s 548(1)(c) (Section 548 Plaintiffs may choose small claims procedure).
[39] Ibid s 548(2).

However, as the *FW Act* provides that a small claims proceeding can only occur at the election of a plaintiff/applicant,[40] and if the plaintiff/applicant does not elect to do so, any matter up to $150,000 will be heard as a normal court proceeding in accordance with the civil procedure rules of the relevant Court, including a claim for under $20,000.[41]

Existing Queensland Magistrates Courts Jurisdiction:

Queensland however, varies slightly to other states and territories, as it currently has an additional jurisdiction for the recovery of wages through Part 5A of the *MC Act* that allows a plaintiff/applicant to file a claim for underpayment of wages up to an amount of $150,000.[42] As part of this process, all claims (regardless of their size) **must** be referred automatically to the Queensland Industrial Relations Commission for conciliation.[43]

If the matters are agreed during conciliation the parties must make a conciliation agreement.[44] If a dispute arises about enforcement of what was agreed, a party may seek an order from the Magistrates Court to enforce the terms of the conciliation agreement.[45] Where matters are not settled during conciliation, the claim is referred back to the Registrar for formal scheduling for hearing and determination before the Magistrates Court,[46] in accordance with the civil procedure rules that apply to the Court.[47]

Qld Wage Theft Bill:

The Qld Wage Theft Bill seeks to eliminate this jurisdiction (other than for a common law employment contract claim) and replace it with a new wage recovery system under the *IR Act.*

In doing so, the Bill has removed the process of compulsory conciliation and replaced it with a voluntary opt-out model of conciliation i.e. all claims will continue to be referred to conciliation overseen by a Queensland Industrial Relations Commissioner, but an employer/respondent can elect to 'opt-out' of the conciliation process – meaning the matter will then proceed to be heard and determined by a Magistrate.

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[40] Ibid s 548(1)(c).
[41] Ibid s 551.
[42] *MC Act* Part 5A.
[43] Ibid s 42F.
[44] Ibid s 42M.
[45] Ibid s 42N.
[46] Ibid s 4(1).
[47] *Uniform Civil Procedure Rules 1999* (Qld) (the '*UCPR*').

The Government's reasoning outlined to the QCU during consultation was that rules of a state court or tribunal cannot be imposed upon a fair work claim under the *FW Act* because of Constitutional issues.

To this end, Section 79 of the *Judiciary Act 1901*(Cth) proscribes that where a state court is vested with federal jurisdiction, the state court can apply the rules and procedures of the state court except where a Commonwealth law provides otherwise. In this case, the *FW Act* vests jurisdiction in an eligible court (which includes a magistrates court) to hear a fair work claim under Section 539 of the *FW Act.*

Therefore, the Magistrates Court in Queensland can apply its own state rules and procedures under the *Uniform Civil Procedure Rules 1999* (Qld) (the '*UCPR*') as to how it hears a fair work claim, except where this would be inconsistent with the rules and procedures set out in the *FW Act.*

The *FW Act* only proscribes procedures relating to an eligible court hearing an application where the plaintiff/applicant has elected to have the matter dealt with as a small claims procedure, specifically:[48]

- the claim for compensation must relate to an entitlement referred to in Section 548(1) of the *FW Act*,
- the court may not award more than $20,000 (or a higher amount if prescribed by regulation) in respect to the claim,
- the court is not bound by any rules of evidence and procedure and may act in an informal manner and without regard to legal forms and technicalities,
- at any stage of the proceedings, the court may amend the papers if sufficient notice is given to any party adversely affected by the amendment,
- a party may be represented by a lawyer only with the leave of the court, and if leave is granted it may be subject to conditions designed to ensure no other party is unfairly disadvantaged,
- a party may be represented by an official of an industrial organisation (a union) where this is not inconsistent with state laws.

[48] *FW Act* s 548.

What this means is that the *FW Act* only provides procedures relating to a small claims procedure up to $20,000 by relaxing the rules of evidence and procedures of the Court, as well as applying the procedures as set out in Section 548.

For other matters (including matters less than $20,000 where a plaintiff/applicant does not elect to proceed with the matter as a small claim), the procedure of the eligible court hearing the matter will apply. In other words, the civil procedure rules that apply to either the Federal Circuit Court,[49] or the Magistrates Court.[50]

It should also be noted that for all matters before the Federal Circuit Court (including a small claims matter), the Court may refer proceedings to mediation in accordance with the Rules of Court.[51]

As is pointed out in the legal advice obtained by the QCU on this issue (refer Appendix 2), the federal jurisdiction not only does **not** prohibit mediation (or conciliation), it appears to go further than the current Qld Wage Theft Bill in terms of providing a capacity for the Federal Circuit Court to order the parties to participate in alternative dispute resolution ('ADR') prior to a claim being heard and determined.[52]

In contrast to the federal jurisdiction where referral to mediation is **by the Court** itself, the Qld Theft Bill permits **a party** who does not wish to participate in conciliation to 'opt-out' of the process.

Finally, because the *FW Act* specifically confers powers on a state magistrates court to hear a fair work claim, there are no Constitutional restrictions that arise with respect to a Section 109 'cover the field' argument.

What will an opt-out Conciliation System do?

There are many benefits of a compulsory conciliation system which are consistent with the introduction of a new wage recovery mechanism to provide a timely, inexpensive, and informal system of resolution of employment claims. Statistics provided by the Office of Industrial Relations during consultation over the Bill indicated that the use of the current

[49] *Federal Circuit Court of Australia Act 1999* (Cth) (the '*FCCCA*'); *Federal Circuit Court Rules 2001* (Cth) (the '*FCC Rules'*).
[50] For example in Qld this is the *Uniform Civil Procedure Rules 1999* (Qld).
[51] *FCCAA 1999* (Cth) s 34; *FCC Rules* r 45.13B.
[52] See paragraph 28.

mandatory conciliation powers during the 2018-19 period saw resolution of 67 per cent of all claims to the Qld Magistrates Court for this period.

One of the other strengths that accompanies resolution by conciliation is the industrial skills and experience of Industrial Relations Commissioners, and the processes of conciliation which focus the parties on settlement of the dispute in an appropriate way.

Clearly, conciliation has benefits for both employers (in particular, small business employers) and workers by removing the need in most case for the parties to be represented by lawyers and their associated costs. The conciliation process also helps to assist in the timely resolution of matters without undue focus on legal forms and technicalities.

Many workers do not have the skills or expertise to participate in a litigated matter without engaging costly and expensive legal representation. For workers represented by unions who may have the skills, litigation is by definition more time consuming and labour intensive as the processes can become quite lengthy.

An 'opt-out' conciliation as currently drafted in the Bill will discourage a range of employees from participating in the process and negate the objectives of the wage recovery mechanism in creating a simple, quick, and low cost jurisdiction.

It should be noted that optional alternative dispute resolution procedures for other court matters are accompanied by a costs jurisdiction which provides a strong incentive for all parties to fully participate in ADR processes where a failure to participate may be a consideration in the awarding of costs by a Court.

However, in contrast to other civil matters, the wage recovery mechanism under the *FW Act* and the *IR Act* is generally speaking a no costs jurisdiction,[53] so there is no similar incentive for an employer to participate in conciliation if it is not compulsory.

The QCU position is therefore that the compulsory nature of conciliation that currently exists under the *MC Act* jurisdiction should be retained for all fair work and state employee claims. The QCU is also clear that there is no legal impediment (Constitutional or otherwise), to the retention of compulsory conciliation or mediation in the Bill. We reiterate, compulsory conciliation is good policy.

[53] *FW Act* s 570; *IR Act* s 545.

Recommendations:

(11) Amend Section 507C(2) Conciliation of the Bill to state:

'The registrar ~~may~~ **must** refer the fair work claim to conciliation'.

(12) Delete Sections 507C(4) and 507C(5):

~~(4) 'If the registrar refers the fair work claim to conciliation and a party does not wish to participate in conciliation, the party must notify the registrar of the fact –~~

~~(c) as soon as practicable; and~~

~~(d) before a conciliation conference begins'.~~

~~(5) If the registrar is notifed under subsection (4) –~~

~~(a) the conciliation must not proceed; and~~

~~(b) the registrar must =~~

~~(i) notify the Industrial Magistrates Court that the conciliation is not proceeding and the reason it is not proceeding; and~~

~~(ii) refer the matter for hearing by the Industrial Magistrates Court'.~~

(13) Amend Section 547C Conciliation sub-section (2):

'The registrar **must** ~~may~~ refer the unpaid amount claim to conciliation'.

(14) Delete Section 547C Conciliation sub-sections (4) and (5):

~~(4) If the registrar refers the unpaid amount claim to conciliation and a party does not wish to participate in conciliation, the party must notify the registrar of that fact –~~

~~(c) As soon as practicable; and~~

~~(d) Before a conciliation conference starts.~~

~~(5) If the registrar is notified under subsection (4)~~

~~(a) the conciliation must not proceed; and~~

~~(b) the registrar must –~~

~~(i) notify the industrial tribunal for the unpaid amount claim that the conciliation is not proceeding and the reason it is not proceeding; and~~

~~(ii) refer the matter for hearing by the industrial tribunal.~~

Multiple Wage Recovery Claims:

A simple, quick, and low-cost wage recovery jurisdiction will avoid the long delays and continued underpayment of wages for many Queensland workers. However, in many instances, wage theft does not occur for one individual, but often does occur for multiple employees on the same matter at the same workplace or organisation. These types of wage theft matters appear to be endemic across industries. For example, consider the high profile cases of 7-11, Woolworths, Bunnings and the like.

Many of these matters have been referred to the Fair Work Ombudsman for investigation, but as has been evidenced before the previous Inquiry of this Committee (and as continues to occur) many workers have been unable to recover the full extent of their unpaid or underpaid wages.

The QCU therefore submits that part of this process should be to ensure that the Commissioners and the Magistrates Court are able to hear multiple claims from employees that relate to the same or substantial matter with the one employer.

In this context, concerns have been raised about whether the jurisdictional cap for hearing a claim in the Magistrates Court (up to $150,000) will restrict the application of multiple claims, or that the rules (to be developed) will restrict plaintiffs/applicants from pursuing a multiple claim.

Case Study 4 – Multiple Claims

An employer deliberately misclassifies a position from a tutor to a demonstrator effectively resulting in an underpayment of wages. The position of tutor applies to approximately 50 employees. However, the underpayment may vary for a number of those employees depending on the date of the misclassification and the date of employment of the employees with an average of $5,000 per person.

The Registrar or Court should be able to order that the claims are joined or heard collectively for both conciliation and determination by the Court. This will assist all parties by minimising costs, and time and resources for the plaintiff/applicant, employer, Commission, and the Court.

If the current *UCPR* was applied, the Magistrates Court may order that two or more proceedings be consolidated if the same or substantially the same question is involved in all the proceedings, or the decision in one proceeding will decide or affect the other

proceeding(s).[54] Further, the Court may order that two or more plaintiffs/applicants be heard together or in a particular sequence.[55]

The QCU would therefore recommend that these rules are adapted for dealing with employment claims under the *IR Act* for both conciliation and hearings.

Recommendation:

(15) Adopt simplified rules similar to rules 78 and 79 of the *UCPR* to ensure that an application can be made to the Registrar to hear multiple claims relating to the same or substantial matter together, or to issue an order to join those matters.

Other Rules and Procedures:

The *FW Act* envisages a wage recovery process to an 'eligible State or Territory court".[56] An eligible State court is currently defined as:

(a) a District, County or Local Court;

(b) a magistrates court;

(c) the Industrial Court of South Australia;

(ca) the Industrial Court of New South Wales;

(d) any other State or Territory court that is prescribed by the regulations.

In respect to small claims proceedings, the Magistrates Court must apply the small claims procedures as set out in Section 548 of the *FW Act*. For matters other than a small claims proceeding, Section 551 of the *FW Act* provides that the Magistrates Court must apply the rules of evidence and procedure for civil matters when hearing proceedings relating to a contravention, or a proposed contravention of a civil remedy provision. Rules of evidence and procedure for civil matters can be found in the rules of the relevant court.[57]

We note that the Minister's Introduction Speech refers to the introduction of:

> "*Industrial Relations (Tribunal) Rules 2011* to facilitate a prompt, simple and more cost-effective process for the hearing and resolution of the claim (by the Industrial Magistrates Court)".

[54] *UCPR* r 78.
[55] Ibid r 79.
[56] *FW Act* ss 12 (definition of 'eligible State or Territory Court'), 539, 541, 542.
[57] For the Qld Magistrates Court see the *UCPR*.

Currently, Part 9, Divisions 1, 2 and 2A of the *UCPR* apply simplified civil procedure rules for employment claims before the Magistrates Court under Part 5A of the *MC Act*. These rules apply to all claims up to $150,000.[58]

If these provisions are removed the processes of alternative dispute resolution ('ADR') will apply to a fair work claim or state employee claim before the Magistrates Court via the application of the *Civil Proceedings Act 2011* (Qld) (the '*CP Act*').[59] Any amendment to the *Industrial Relations (Tribunal) Rules* will only apply to the processes of conciliation by the Queensland Industrial Relations Commission.

Recommendation:

(16) Any amendment to the civil rules and procedures as is currently applied by the *UCPR* must take account of consequential amendments to the *CP Act* to ensure the conciliation and not ADR processes apply for the conciliation and determination of wage recovery matters under the Bill.

[58] Note: the ADR processes available under the *Civil Proceedings Act 2011* (Qld) (the '*CP Act*') do not apply to an employment claim under the *MC Act* by way of the *CP Act* s 38.
[59] *CP Act* s 38.

Appendix 1 – Wage Theft Case Studies

Case Study 1 - Declan Langlands (Unlawful deductions)

Declan started working at the Pig'n'Whistle's Riverside venue on the 13th of March 2019 as a food and beverage attendant and was dismissed on the 12th of October 2019. Declan stated that the event that immediately preceded his dismissal was his refusal to pay for a table that had not covered their own bill.

Declan has referenced numerous structural and cultural issues at his former workplace. Initially, he was asked to sign a conditions of employment contract in which employees agreed to have their wages docked for till imbalances (Appendix 1). These deductions are not recorded on employee's payslips but there is evidence of a discrepancy between Declan's entitlements on his payslip and the amount deposited into Declan's account.

On occasion, these deductions were not from wages but directly from employees' accounts with Declan asked to hand over his debit card to cover a bill. There is a charge from the Pig'n'Whistle recorded in Declan's bank statement despite the fact that employees are contractually prohibited from making any purchases from the venue, during or outside of shift times.

Declan has recounted multiple instances of wage deduction due to till imbalances.

- May 8 2019: a group of customers left the venue without paying the bill of $51.80. Upon informing his manager, Declan was asked to use his debit card to cover the cost of the order. He states that he complied out of fear of losing his job.
- 19 July 2019: while working with a colleague in a large outdoor area, a table of customers left without paying their bill of $170.10. Declan informed his manager of the incident and was told that he and his colleague would each have $85.05 deducted from their wages in instalments of $21.25 over a period of 4 weeks.
- July 31 2019: a message was sent to all staff stating that "stocktake was shocking" and as a result, the area manager would be deducting $49 from each employee's pay that week (Appendix 2).

All employees received the base rate of $24.36/hour which continued past the probation period. Declan states that he was performing duties beyond the introductory level and his pay rate did not reflect this. Additionally, he continued to receive the basic introductory rate despite working overtime on weekends and public holidays.

When he was advised of his dismissal, a co-worker was instructed to inform him of the decision which was done via direct message on Instagram.

In addition, Declan has stated that the work health and safety standards are low: mainly the expectation for employees to change kegs after watching the operation being performed on one occasion. Declan states that the kegs are extremely heavy and the process is a very dangerous operation as the kegs are stacked on top of each other.

Case Study 2 – Greenmountain meatworks (Unreasonable deductions)

In 2018, labour hire workers at a Brisbane Valley meatworks were underpaid and exploited by a southern operator labour hire agency 'Goyx Labour Hire' who supplied fifty 417 visa workers to the Greenmountain meatworks in Coominya.

The former workers say they were forced into renting certain local houses, were not paid superannuation or overtime, failed to have income tax withheld and pay a bond of up to $600 before starting work.

The majority of visa workers were from Taiwan on student working visas. The workers were required to pay hundreds of dollars just to get a start at the meatworks, and then hundreds more in rent for accommodation to a person connected with the company.

Workers were not given pay slips, worked well over the 38-hour week but received no overtime pay or superannuation. As a result of the costs of forced rental and the employment bond they were required to pay upfront, their hourly rate was well below the award and what was paid to other workers at the site.

Former worker Joanne Szu-Jui confirmed that she and other workers at the site did not receive payslips, and there was no record of superannuation, income tax or overtime payments.

Joanne was forced to rent in a particular house nearby, with other workers sharing bedrooms and even sleeping in the lounge room. There were 12 people in the one house.

Case Study 3 – Declan Langlands (Sham Contracting)

Declan started working at the Pig'n'Whistle's Riverside venue on the 13th of March 2019 as a food and beverage attendant and was dismissed on the 12th of October 2019. Declan stated that the event that immediately preceded his dismissal was his refusal to pay for a table that had not covered their own bill.

Declan has referenced numerous structural and cultural issues at his former workplace. Initially, he was asked to sign a conditions of employment contract in which employees agreed to have their wages docked for till imbalances (Appendix 1). These deductions are not recorded on employee's payslips but there is evidence of a discrepancy between Declan's entitlements on his payslip and the amount deposited into Declan's account.

On occasion, these deductions were not from wages but directly from employees' accounts with Declan asked to hand over his debit card to cover a bill. There is a charge from the Pig'n'Whistle recorded in Declan's bank statement despite the fact that employees are contractually prohibited from making any purchases from the venue, during or outside of shift times.

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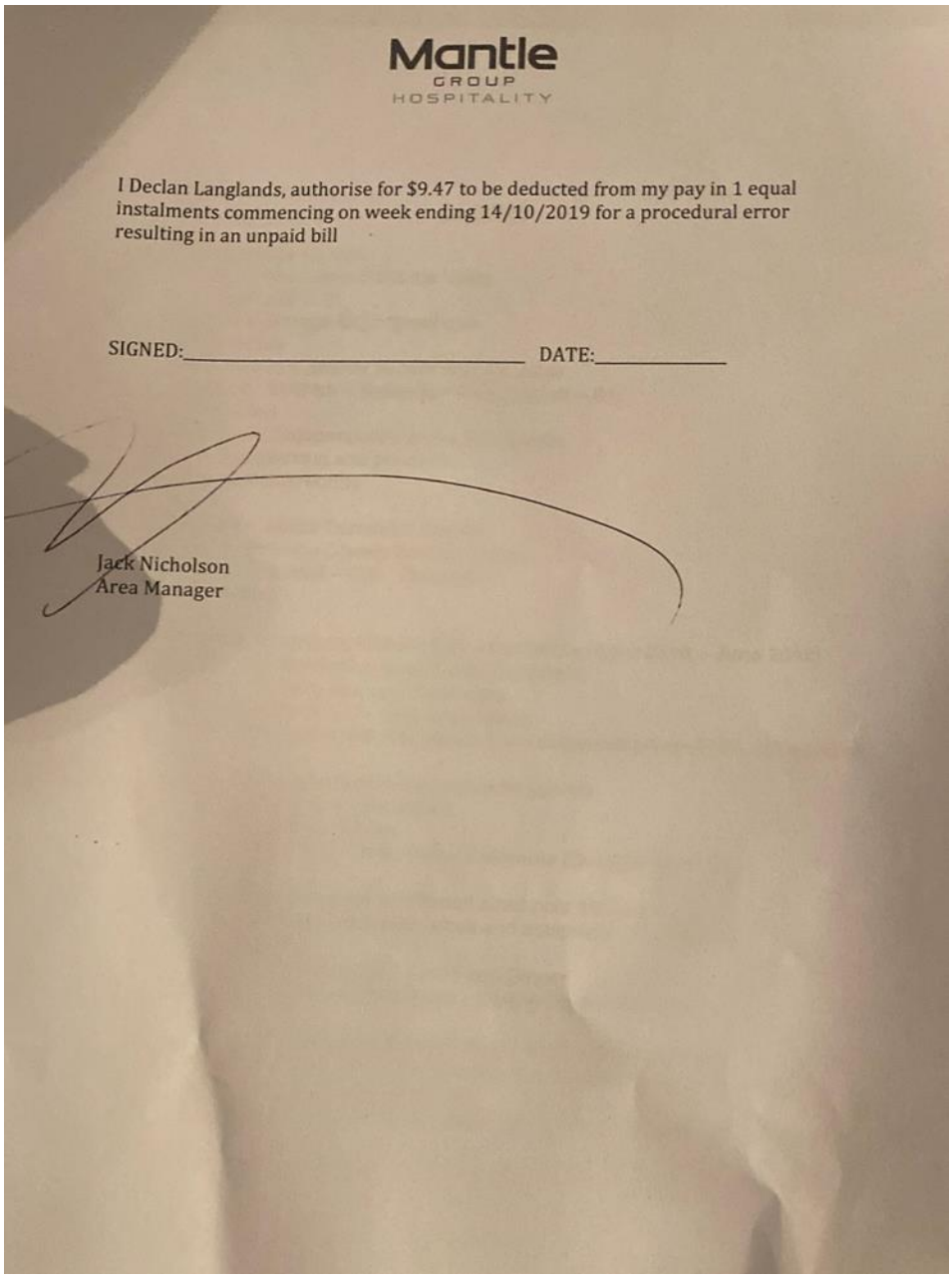
In addition, Declan has stated that the work health and safety standards are low: mainly the expectation for employees to change kegs after watching the operation being performed on one occasion. Declan states that the kegs are extremely heavy and the process is a very dangerous operation as the kegs are stacked on top of each other.



Mantle
GROUP
HOSPITALITY

I Declan Langlands, authorise for $9.47 to be deducted from my pay in 1 equal instalments commencing on week ending 14/10/2019 for a procedural error resulting in an unpaid bill

SIGNED:_____ DATE:_____

Jack Nicholson
Area Manager

Appendix 2 – Legal Advice on Conciliation

See emailed Attachment.

HPL HALL PAYNE LAWYERS

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30 July 2020

Contact
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[redacted]

Mr Michael Clifford
The Secretary QCU
Level 5, 16 Peel Street
SOUTH BRISBANE QLD 4101

By Email: [redacted]

Dear Michael

Re: ***Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020***

You have sought our advice regarding whether there are any Constitutional or other legal impediments, that prevent the *Industrial Relations Act 2016* (Qld) from being amended to include a requirement that the parties to a claim arising under s.539 of the *Fair Work Act 2009* (Cth), and commenced in the Industrial Magistrates Court of Queensland, participate in a compulsory conciliation of the dispute.

Our advice is as follows.

Executive summary

1. Currently, employees seeking to recover wages in Queensland can commence proceedings in the Federal Circuit Court in relation to claims arising from contraventions of the *Fair Work Act 2009* (Cth); or in the Magistrates Court in relation to claims arising from, relevantly, contraventions of s.45 and s.50 of the *Fair Work Act 2009* (Cth) or breaches of the employee's contract of employment. There is some potential for overlap between these jurisdictions – for example, where a contract of employment incorporates terms found in a federal instrument.

2. Claims commenced in the Federal Circuit Court are dealt with pursuant to the *Federal Circuit Court of Australia Act 1999* (Cth) and the *Federal Circuit Court Rules 2001* (Cth), which include provision for the Court to order that the parties participate in a conciliation of the dispute, subject to the Court's discretion.

3. Employment contract claims commenced in the Magistrates Court are dealt with pursuant to Part 5A of the *Magistrates Court Act 1921* (Qld), which includes a requirement that the parties to the dispute participate in a compulsory conciliation, conducted by a member of the Queensland Industrial Relations Commission, prior to a hearing of the matter.

4. The *Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020*, seeks to establish a quick, simple and cost-efficient jurisdiction through which to recover unpaid wages utilising the jurisdiction of the Industrial Magistrates Court of Queensland.

5. The Bill proposes to amend the *Industrial Relations Act 2016* (Qld) to permit employees to bring a claim arising under a federal instrument (including the *Fair Work Act 2009*) in the Industrial Magistrates Court, and to have the claim dealt with pursuant to the procedure set out in the Bill. The procedure contemplated by the Bill does not include the requirement that the parties participate in compulsory conciliation, and permits one or both of the parties to refuse to participate in a conciliation of the dispute, in which case the dispute would move to a hearing and determination by the Industrial Magistrate.

6. It is open to the Queensland Parliament to amend the *Industrial Relations Act 2016* (Qld) to provide for the compulsory conciliation of fair work claims commenced in the Industrial Magistrates Court, including by replicating the relevant provisions in the *Magistrates Court Act.*[1]

7. It is highly unlikely that an amendment in these terms would give rise to an inconsistency between the State legislation and the Federal legislation that governs how fair work claims are managed in the Federal Circuit Court, primarily because:

   (a) s.539 of the *Fair Work Act 2009* presently confers jurisdiction on eligible State and Territory courts to hear and determine fair work claims;

   (b) s.79 of the *Judiciary Act 1903* (Cth) provides that the laws of each State or Territory will be binding on all courts exercising federal jurisdiction, except as otherwise provided by the Constitution or the laws of the Commonwealth; and

   (c) having regard to s.109 of the *Constitution of Australia,* there is no apparent inconsistency arising from two separate (albeit similar) processes, applicable to different Courts, having different procedural requirements in terms of participation in conciliation.

Our instructions

8. We are instructed as follows:

- *The 2018 Queensland Parliamentary Inquiry recommended the creation of a simple, quick and low-cost wage recovery process for Queensland workers.*
- *Union recommendations were to maintain the existing system to pursue wage claims before the Queensland Magistrate's Court under the Magistrate's Courts Act with some amendments which included the creation of an Industrial Division of the Magistrates Court to ensure there were sufficient Magistrates with an industrial background and/or training to deal with the issues.2*
- *One of the successes of this existing jurisdiction has been the high resolution of claims via a mandatory conciliation process before a Queensland Industrial Relations Commissioner (67% of claims settled by conciliation in 2018-19).*
- *The Queensland Government has now introduced a new wage recovery system under the Industrial Relations Act 2016 (Qld) to replace the existing Magistrates Courts Act jurisdiction. A key concern is the removal of the mandatory conciliation mechanism and replacement with a voluntary opt-out conciliation model.*
- *The Government's reasoning is that a state court or tribunal can not impose mandatory conciliation process onto a federal fair work claims matter because of Constitutional issues.*
- *Unions are advocating that there should be two pathways as envisaged by the FW Act:*
  - *A plaintiff can elect to have their claim of up to $20,000 heard as a small claims proceeding by the Magistrates Court with a relaxation of its strict rules and procedures. This could include an opt out conciliation process which would not offend the Commonwealth Judiciary Act.*
- *A plaintiff may also elect to have any claim for any amount up to $150,000 to be referred to an Industrial Relations Commissioner for mandatory conciliation. Where agreement is unable to be reached during conciliation, the matter is to proceed to the Court but not as a small claims proceeding.*

[1] Specifically, s.42D-K of the *Magistrates Court Act 1921* (Qld)
[2] Also consistent with the 2018 Qld Parliamentary Inquiry Recommendations.

What will an Opt-out Conciliation System do?

- *Introducing a system where employers can opt out of conciliation means that an employer who has a wide range of resources to fund litigation is likely to opt out of conciliation to have the matter heard and determined by a Court.*
- *The Court process for a wage claim of any size can be quite complex and is subject to many technical legal rules and procedures making it a difficult process to navigate for a 'lay-person', let alone a low paid vulnerable worker.*
- *Opting out of conciliation is a legal tactic often used in other matters to dissuade workers from pursuing a claim because of their lack of expertise in what is a highly technical and legal proceeding. Workers also lack funding to secure appropriate legal representation.*
- *In contrast to other civil matters, the wage recovery mechanism is a no costs jurisdiction so there is no similar incentive for employers to participate in conciliation if it is not mandatory.*

Benefits of Mandatory Conciliation:

- *The objective of a new wage recovery mechanism was to provide for a timely, inexpensive and informal resolution of fair work claims in an Industrial Magistrate's Court.*
- *Statistics provided by the Department indicate that the use of mandatory conciliation during the 2018-19 period saw 67 per cent of all claims resolved through conciliation.*
- *The process of conciliation is before a Commissioner experienced in dealing with industrial matters and is focused on settlement of the dispute in an appropriate way.*
- *This has benefits for both small business employers and workers by removing the need in most cases for the parties to be represented by lawyers and associated costs. It also results in timely resolution of matters without undue focus on legal forms and technicalities.*

Background

9. In 2018, the Queensland Parliamentary Education, Employment and Small Business Committee (**the Committee**) conducted an inquiry into wage theft in Queensland.

10. The Committee tabled its report '*A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland*' (the Report) on 16 November 2018.

11. The Report relevantly recommended that the Queensland Government give consideration to amending the existing legislation to provide for a method of wage recovery that was simple, quick and effective, as follows:

> ***Recommendation 8***
>
> *The committee recommends the Queensland Government review and take actions available to it, to ensure that wage recovery processes for Queensland workers are simple, quick and low-cost. This should include further investigation of the following options:*
> *a) establishing a dedicated industrial division within the Queensland Magistrates Court, in line with the example in Victoria;*
> *b) investigating the inclusion of the Queensland Industrial Relations Commission or Industrial Court as an eligible state court under the Fair Work Act 2009 (Cth);*
> *c) reviewing relevant forms and processes to ensure the legal process is simple and user friendly for workers and their representatives; and*
> *d) waiving or reducing current court filing fees for wage theft matters.*

The Bill

12. On 15 July 2020, the Minister for Education and Industrial Relations, The Honourable Grace Grace, introduced the *Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020* (**the Bill**) into the Queensland Parliament.

13. The Bill, inter alia, addresses Recommendation 8(a)-(b) of the Report, by:

> *'facilitating the Industrial Magistrates Court's jurisdiction for wage recovery matters, including the small claims wage recovery procedure for matters of not more than $20,000 under section 548 of the Fair Work Act 2009 (Cth) (FW Act).'*[3]

14. The Bill 'facilitates' the jurisdiction of the Industrial Magistrates Court by amending the *Industrial Relations Act 2016* (Qld) (**the IR Act**), to insert a new division – Division 4 Fair work claims.

15. Division 4 expressly proceeds on the basis that the Industrial Magistrates Court of Queensland is an eligible State Court for the purpose of s.539 of the *Fair Work Act 2009* (**the FW Act**), and establishes a process for dealing with '*fair work claims*' commenced in the Industrial Magistrates Court.

16. The Bill provides for the following definitions for Division 4:

> ***fair work claim*** *means a claim in relation to a civil remedy provision.*
>
> ***civil remedy provision*** *see the Fair Work Act 2009 (Cwlth), section 539(1) and (3).*

Fair Work claim

17. Section 539 of the FW Act sets out the relevant civil remedy provisions in the FW Act, along with the legal person with standing to commence proceedings in relation to the civil penalty provision, the courts with jurisdiction to hear such proceedings and the maximum penalty available in respect of a contravention of the civil penalty proceedings.

18. Relevantly for the purpose of the Bill, s.539 of the FW Act, provides that a contravention of a term of a modern award (s.45) and a contravention of a term of an enterprise agreement (s.50) are civil penalty provisions.

19. Accordingly, passage of the Bill will permit an employee, who alleges that their employer has failed to pay wages in accordance with the terms of an enterprise agreement or a modern award, to bring a claim in the Industrial Magistrates Court to recover wages lost as a result of the alleged contravention, provided the value of the claim does not exceed the jurisdictional limits of the Industrial Magistrates Court.[4]

Small Claims Procedure

20. Section 548 of the FW Act, permits a person who applies for an order (other than a pecuniary penalty order) under Part 4-1 Division 2 of the FW Act, to nominate for the application to be dealt with through the small claims procedure.

21. Although there is no direct reference to the small claims procedure in the Bill, the Explanatory Notes that accompanied the Bill make clear that Parliament's intention is that an applicant who commences a fair work claim in the Industrial Magistrates Court, will have the ability to choose whether their claim is dealt with under the small claims procedures. The Explanatory Note states as follows:

> ***Part 3 Amendment of Industrial Relations Act 2016***
>
> *…*
>
> *Clause 9 inserts new division 4 (Fair work claims) into Part 3 of Chapter 11 to provide for the efficient exercise of jurisdiction of the Industrial Magistrates Court to perform functions as an eligible court under the FW Act. <u>These provisions will also enable a worker to access the small claim procedure under the FW Act that simplifies the recovery process for workers.</u>*

[3] Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020 – Explanatory notes

[4] s.506(1) of the IR Act confers jurisdiction on Industrial Magistrates to exercise powers conferred on, or jurisdiction give to, magistrates by this Act or another Act; Provided the quantum of the claim falls within the jurisdictional limit of the Industrial Magistrates Court, being less than $150,000.00.

(our emphasis)

22. The small claims procedure is set out at s.548 of the FW Act and Division 45.4 of the *Federal Circuit Court Rules 2001* (Cth) (**the FCC Rules**). The features of the small claims procedure are as follows:

(a) the claim for compensation must relate to an entitlement referred to in s.548(1A) of the FW Act;[5]

(b) the court may not award more than $20,000.00 (or a higher amount, if prescribed by regulation) in respect of the claim;[6]

(c) the court is not bound by any rules of evidence and procedure, and may act in an informal manner and without regard to legal forms and technicalities;[7]

(d) the application must be in accordance with the approved forms and accompanied by a claim in accordance with the approved forms;[8]

(e) at any stage of the proceedings, the court may amend the originating document on the provision of notice to the other party to the proceedings;[9]

(f) a party may be represented in the proceedings by a lawyer only with the leave of the court, and leave may be granted subject to conditions designed to ensure that no other party is unfairly disadvantaged;[10] and

(g) a party to the proceedings may be represented by an official of an industrial association, subject to regulation,[11] or in respect of proceedings heard in eligible State Courts, subject to the laws of the State allowing a party to be represented by officials of industrial associations.[12]

23. The small claims procedure does not include specific provision for the mediation (or conciliation) of small claims.

Mediation of Fair Work matters

24. The mediation of applications under the small claims procedure, are dealt with in the same manner as other proceedings in the Fair Work Division of the Federal Circuit Court.

25. Section 34 of the *Federal Circuit Court of Australia Act 1999* (Cth), relevantly provides:

> ***34 Mediation***
>
> *(1) The Federal Circuit Court of Australia may, by order, refer proceedings in the Federal Circuit Court of Australia, or any part of them or any matter arising out of them, to a mediator for mediation in accordance with the Rules of Court.*
> *(2) Subsection (1) has effect subject to the Rules of Court.*
> *(3) Referrals under subsection (1) to a mediator may be made with or without the consent of the parties to the proceedings.*
> *(4) Evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under subsection (1) is not admissible:*
> *(a) in any court (whether exercising federal jurisdiction or not); or*

[5] s.548(1) of the *Fair Work Act 2009* (Cth); r.45.11(1)(b) of the *Federal Circuit Court Rules 2001* (Cth)
[6] s.548(2) of the *Fair Work Act 2009* (Cth); r45.11(1)(a) of the *Federal Circuit Court Rules 2001* (Cth)
[7] s.548(3) of the *Fair Work Act 2009* (Cth); r45.11(2) of the *Federal Circuit Court Rules 2001* (Cth)
[8] r45.12 of the *Federal Circuit Court Rules 2001* (Cth)
[9] s.548(4) of the *Fair Work Act 2009* (Cth)
[10] s.548(5)-(6) of the *Fair Work Act 2009* (Cth); r45.13 of the *Federal Circuit Court Rules 2001* (Cth)
[11] s.548(8) of the *Fair Work Act 2009* (Cth)
[12] s.548(9) of the *Fair Work Act 2009* (Cth)

(b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence.

(5) A mediator has, in mediating anything referred under subsection (1), the same protection and immunity as a Judge has in performing the functions of a Judge.

(our emphasis)

26. The FCC Rules sets out the process for the mediation of proceedings initiated pursuant to the FW Act, as follows:

45.13B Mediation—Fair Work Act and Registered Organisations Act proceedings

(1) This rule applies if the Court refers for mediation under section 34 of the Act a proceeding, or a part of a proceeding, or a matter arising out of a proceeding, to which this Part applies.

(2) The mediator for the mediation must be:

(a) a Judge; or

(b) a Registrar; or

(c) another person appointed by the Court for the purpose; or

(d) an FWC member nominated by the President of the Fair Work Commission.

(3) Unless the Court or a Registrar otherwise orders:

(a) the parties to the proceeding must attend the mediation in person; and

(b) the lawyer or lawyers representing the parties to the proceeding must attend the mediation.

(4) Unless the Court otherwise orders, if an order for mediation is made, the proceeding is adjourned until the earlier of the following:

(a) the day the mediator reports to the Court; or

(b) the day fixed by the Court on which the mediator must report to the Court about progress in the mediation.

(5) The parties must make a genuine effort to reach agreement on relevant matters in issue.

(6) If the mediator considers that the mediation should not continue, the mediator must, subject to any order of the Court:

(a) end the mediation; and

(b) advise the Court of the outcome.

(7) If an issue between the parties remains unresolved at the end of the mediation, the Judge or Registrar may:

(a) give further directions; and

(b) make any other order, including an order for costs.

(8) In this rule:

***FWC member** has the meaning given by section 12 of the Fair Work Act.*

***President** has the meaning given by section 12 of the Fair Work Act.*

27. In the federal jurisdiction, an applicant who commences a fair work claim in the Federal Circuit Court, regardless of whether the elect to have the claim dealt with under the small claims procedure, may be ordered by the Court to participate in a mediation. The mediation is then conducted pursuant to the FCC Rules.

28. The federal jurisdiction appears to go further than the current Bill in terms of providing a capacity to require, by order, parties to participate in alternative dispute resolution prior to the claim being heard and determined.

Wage recovery in Queensland

29. In addition to wage recovery claims in the Federal Circuit Court, employees in Queensland have the ability to commence wage recovery claims in the Magistrates Court (as an eligible Court under s.539), and a breach of contract claim in the Magistrates Court, in circumstances where the claim arises out of an alleged breach of a contract of employment between the employee and the employer.

30. Part 5A of the *Magistrates Court Act 1921* (Qld), provides for a simplified process for contractual employment claims in the Magistrates Court, as follows:

42A Object of pt 5A

> *(1) The object of this part is to reduce the cost of proceedings brought in a Magistrates Court by low income employees against employers for breaches of contracts of employment.*
> *(2) The object is achieved by—*
> *(a) prescribing, under section 54, lower court fees for the proceedings; and*
> *(b) providing for awards of costs in limited circumstances; and*
> *(c) allowing parties to be represented, without leave, by relevant organisations; and*
> *(d) providing for compulsory conciliation before the hearing of the proceedings.*
>
> (our emphasis)

31. Part 5A is supported by Division 2 of Chapter 13 of the *Uniform Civil Procedure Rules 1999* (Qld), which provides for simplified procedures in respect of claims commenced pursuant to s.42B of the Magistrates Court Act.

32. The Bill does not interfere with the jurisdiction of the Magistrates Court in respect of breach of employment contract claims, except by clarifying that a claim under the FW Act is not an employment claim for the purpose of s.42B of the Magistrates Court Act.

Compulsory conciliation

33. Proceedings commenced in the Magistrates Court pursuant to s.42B, are subject to the following procedure:

    (a) as soon as practicable after the claim is filed, the registrar must appoint a conciliator for the dispute;[13]

    (b) the conciliator must start conciliating the dispute as soon as practicable after being appointed;[14] and

    (c) the parties to the dispute must comply with a requirement made by the conciliator in relation to participation in the conciliation process.[15]

34. Members of the Queensland Industrial Relations Commission are approved as conciliators for breach of employment contract claims in the Magistrates Court.[16]

35. Where matters are unable to be conciliated, the conciliator will issue a certificate and refer the matter back to the Magistrates Court for determination.

36. One of the successes of the existing jurisdiction has been the high resolution of claims, following the mandatory conciliation process before a Queensland Industrial Relations Commissioner. We are instructed that 67% of simplified employment claims settled by conciliation in 2018-19, and that the requirement that parties participate in an early conciliation of the dispute has assisted in either the timely resolution of the dispute, or the efficient progress of the dispute through a narrowing of the issues for determination by the Magistrate.

Voluntary conciliation

37. Despite the reported success of compulsory conciliations in terms of facilitating the low cost resolution of breach of employment contract claims brought in the Magistrates Court, a requirement that the parties to a fair work claim participate in a compulsory conciliation, is not a feature of the Bill currently before Parliament.

[13] s.42F of the *Magistrates Court Act 1921* (Qld)
[14] s.42G of the *Magistrates Court Act 1921* (Qld)
[15] s.42H of the *Magistrates Court Act 1921* (Qld)
[16] s.42S of the *Magistrates Court Act 1921* (Qld)

38. The Bill provides for voluntary conciliation in the following terms:

> ***507C Conciliation***
>
> *(1) This section applies if a person has started a proceeding for a fair work claim in an Industrial Magistrates Court.*
> *(2) The registrar may refer the fair work claim to conciliation.*
> *(3) The referral of the fair work claim to conciliation—*
> *(a) must be done as soon as practicable after the proceeding for the claim is started; and*
> *(b) must be done before the Industrial Magistrates Court hears the claim; and*
> *(c) should preferably be done before a party to the claim files a defence to the claim.*
> *(4) If the registrar refers the fair work claim to conciliation and a party does not wish to participate in conciliation, the party must notify the registrar of that fact—*
> *(a) as soon as practicable; and*
> *(b) before a conciliation conference starts.*
> *(5) If the registrar is notified under subsection (4)—*
> *(a) the conciliation must not proceed; and*
> *(b) the registrar must—*
> *(i) notify the Industrial Magistrates Court that the conciliation is not proceeding and the reason it is not proceeding; and*
> *(ii) refer the matter for hearing by the Industrial Magistrates Court.*
>
> (our emphasis)

39. The proposed s.507C differs from the requirements in the Magistrates Court Act, in two respects:

(a) s.507C(2) gives the Registrar a discretion as to whether to refer the fair work claim for conciliation, whereas s.42F of the Magistrates Court Act requires the Registrar to appoint a conciliator for the dispute; and

(b) s.507C(4)-(5) permits a party who does not wish to participate in the conciliation to notify the Registrar of that fact, in which case the conciliation must not proceed, whereas s.42H of the Magistrates Court Act requires the parties to comply with the conciliators decisions regarding the conduct of the conciliation.

40. It is relevant to note that s.507C also differs from the relevant provisions of the federal legislation regarding the conduct of alternative dispute resolution processes in fair work claims, as the federal legislation does not allow a party to refuse to participate in a conciliation ordered under s.34 of the *Federal Circuit Court of Australia Act 1999* (Cth).

Constitutional issue

41. We are instructed that the rationale behind the inclusion of voluntary (as opposed to compulsory) conciliation, is due to concerns regarding a potential constitutional issue arising from an inconsistency between State and Commonwealth law.

42. As you are aware, s.109 of the *Australian Constitution* relevantly provides:

> ***Inconsistency of laws***
>
> *When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*

43. For s.109 to apply, there must be two valid laws providing for the same subject matter. That is, Queensland must enact a valid law that is inconsistent with a law of the Commonwealth.

44. A potential inconsistency may arise if the IR Act were to impose a requirement that parties to a fair work claim commenced in the Industrial Magistrates Court of Queensland, participate in a compulsory conciliation (or mediation) of the dispute, in circumstances where

the Federal legislation does not mandate that fair work claims commenced in the Federal Circuit Court proceed to conciliation (and instead leaves the question of alternative dispute resolution to the discretion of the judge).

45. Of assistance in determining whether an inconsistency arises, is the division in *Momcilovic v The Queen*,[17] where Crennan and Kiefel JJ said at 637:

> *Inconsistency in the relevant sense does not arise merely because of the co-existence of two laws capable of simultaneous obedience or because of the existence of differences between them. Further, the fact that a Commonwealth law and a State law "impose different penalties for the same conduct does not necessarily mean that the laws are inconsistent." What is required in every case is that the two laws being compared be construed so as to determine their operation, as a matter of construction, and, in particular, so as to determine whether the Commonwealth's coverage of the subject matter is complete, exhaustive or exclusive.*
>
> (our emphasis)

46. There are a number of persuasive arguments against excluding mandatory conciliation from the Bill on the basis that it is inconsistent with Federal legislation. We set these out below.

47. Firstly, it seems clear that the *Judiciary Act 1903* (Cth) contemplates circumstances in which a State or Territory court would apply the State or Territory laws relating to procedure to a case involving the exercising of federal jurisdiction.

48. The relevant provision of the Judiciary Act is as follows:

> ***79 State or Territory laws to govern where applicable***
>
> *(1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.*
> *(2) A provision of this Act does not prevent a law of a State or Territory covered by subsection (3) from binding a court under this section in connection with a suit relating to the recovery of an amount paid in connection with a tax that a law of a State or Territory invalidly purported to impose.*
> *(3) This subsection covers a law of a State or Territory that would be applicable to the suit if it did not involve federal jurisdiction, including, for example, a law doing any of the following:*
> *(a) limiting the period for bringing the suit to recover the amount;*
> *(b) requiring prior notice to be given to the person against whom the suit is brought;*
> *(c) barring the suit on the grounds that the person bringing the suit has charged someone else for the amount.*
> *(4) For the purposes of subsection (2), some examples of an amount paid in connection with a tax are as follows:*
> *(a) an amount paid as the tax;*
> *(b) an amount of penalty for failure to pay the tax on time;*
> *(c) an amount of penalty for failure to pay enough of the tax;*
> *(d) an amount that is paid to a taxpayer by a customer of the taxpayer and is directly referable to the taxpayer's liability to the tax in connection with the taxpayer's dealings with the customer.*

49. It cannot be said that a s.109 inconsistency arises simply as a result of a State or Territory having different laws in relation to, inter alia, Court procedure, to that of a Commonwealth Court, when such a scenario is clearly contemplated by the Judiciary Act. There would need to be direct inconsistency between the relevant procedures to the extent that a Commonwealth law "otherwise provided", in order to displace the presumption contained at s.79 of the Judiciary Act.

50. It is not at all clear that such an inconsistency would actually exist if the IR Act provided for compulsory conciliation for fair work claims in the Industrial Magistrates Court. If s.42D-42K of the Magistrates Court Act were replicated in the Bill amending the IR Act, it would be well

[17] (2011) 245 CLR 1.

arguable that no inconsistency would arise because the State and Federal legislation would simply provide for two separate (albeit similar) processes for dealing with fair work claims, depending on whether the applicant elected to commence the proceeding in the Federal Circuit Court or in the Industrial Magistrates Court. It is not apparent that any Commonwealth law would "otherwise provide" so as to displace the presumption in s.79 of the Judiciary Act.

51. The fact that there may be two separate procedural requirements, for two separate jurisdictions, is not a direct inconsistency between the laws of those jurisdictions.

52. Thirdly, in the absence of direct inconsistency, the inclusion of compulsory conciliation in the Bill may give rise to a constitutional issue if it were the case that the Commonwealth's coverage of the subject matter was to be complete, exhaustive or exclusive.

53. However, there can be no suggestion of such an inconsistency arising as a result of the proposed inclusion of compulsory conciliation in the IR Act, having regard to the fact that s.539 of the FW Act confers jurisdiction on eligible State courts, in respect of fair work claims, but does not provide for procedural matters in the exercise of that jurisdiction by those State Courts. Thus a "gap" for the purposes of s.79 arises (c.f. *Masson v Parsons* (2019) 93 ALJR 848 at [30]). If the Commonwealth had intended for there to be no deviation in terms of the manner in which fair work claims are conducted, it was open to the Commonwealth to counter the effect of s.79 of the Judiciary Act, by providing that the federal laws relating to process and procedure in Federal Courts would apply in respect of fair work claims commenced in an eligible State court.

54. Finally, if a variation in the procedure for dealing with a fair work claim in the Industrial Magistrates Court was evidence of an inconsistency between State and Federal law, then it is arguable that the Bill in its current form is subject to the same criticism.

55. Specifically, the Bill departs from s.34 of the Federal Circuit Court of Australia Act and s.45.13B of the FCC Rules in a number of respects, including most notably by permitting a party to a dispute to refuse to participate in a conciliation convened by a Queensland Industrial Relations Commission conciliator, and the conciliator being bound to accept the party's refusal to participate.

Conclusion

56. In our view, arguments that the Queensland Parliament is prevented from requiring parties to a fair work claim in the Industrial Magistrates Court, to participate in a compulsory conciliation at an early stage of the dispute, cannot sensibly be entertained in light of the Commonwealth parliament conferring jurisdiction on State Courts in respect of fair work claims, and clearly contemplating that those claims be subject to the procedures of the court in which the claim is commenced. Further, there is no apparent Federal law which applies so as to give rise to a relevant conflict.

This advice has been settled by Mr Christopher Murdoch of Queens Counsel.

Yours faithfully

John Payne
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